Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

In the Matter of: THE GINTHER TRUSTS,
A Texas Joint Venture.

FERGUS M. GINTHER,

Petitioner,

v.

THE GINTHER TRUSTS, A Texas Joint Venture;
and REDSTONE EL DORADO ACQUISITION LP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The problem in this case is that the bankruptcy court lacked subject matter jurisdiction. Petitioner challenged the bankruptcy court's assumption of subject matter jurisdiction on the grounds that a trust may not seek federal bankruptcy protection. The purported basis for jurisdiction was that the trust was actually a joint venture, which could seek such protection.

This jurisdictional claim is a flagrant example of "manufactured, convoluted federal subject matter theory," *see Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 587 (1999), because it is settled law that trusts may not invoke bankruptcy protection and that this trust is not a joint venture that can.

Petitioner argued lack of subject matter jurisdiction at every step of the proceeding below. He was denied his day in court on the issue, because in the first instance the courts ducked the jurisdictional issue and reached the merits instead, holding that he was not entitled to a stay of the sale of the El Dorado Ranch.

In the second instance, he was denied his day in court on the issue of subject matter jurisdiction because of rulings under the "absolute mootness" doctrine that because he had not actually *obtained* a stay of the sale, his appeal was moot. But the "absolute mootness" rule, upon which the Circuits are split, is contrary to this Court's mootness teachings. Effectual relief — namely, dismissal of the bankruptcy proceeding — could have been rendered. Thus, the prime threshold issue of subject matter jurisdiction was never reached due to reliance upon a bad rule of law.

In *Ruhrgas* this Court held that there is no hierarchy to threshold issues; that a district court has discretion to consider personal jurisdiction before subject matter jurisdiction and should generally choose the more straightforward issue. When the "absolute mootness" doctrine developed in appeals from orders authorizing the sale of assets in bankruptcy cases is applied to a record in which the application for stay raising the challenge to subject matter jurisdiction was denied without comment, the right to challenge subject matter jurisdiction unconstitutionally disappears, we contend, from the case, or becomes, in the words of the Fifth Circuit here, "irrelevant." The threshold issue of subject matter jurisdiction is thus neatly avoided at the outset by the exercise of "hypothetical jurisdiction" — contrary to *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) — and the very fact that it was avoided at the outset becomes the premise for the appearance of the second threshold issue of mootness which, as *Ruhrgas* teaches, will always prove to be more straightforwardly determinable under an "absolute mottness" rule that requires the reviewing court only to consider whether a stay was obtained.

The question presented is:

"Does the doctrine of 'absolute mootness', upon which the Circuits are split, permit covert expansion of the subject matter jurisdiction of the bankruptcy courts under the guise of procedural efficiency?"

LIST OF PARTIES

The caption of the case contains the names of parties to the appeal before The Fifth Circuit. Various other parties to the bankruptcy court's Final Judgment participated in the proceedings seeking a stay but not in the appeal. All parties to the bankruptcy court's judgment are listed in that judgment, which appears in the Appendix. (Pet. App. 38a-41a).

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1. The opinion of the United States Court of Appeals for the Fifth Circuit in No. 00-20593; *In re The Ginther Trusts, A Texas Joint Venture*, 238 F.3d 686 (5th Cir. 1/29/01), is set forth in the Appendix hereto (Pet. App. 1a).

2. The order of the United States District Court for the Southern District of Texas, Houston Division, in No. 00-1295; *Fergus M. Ginther and Adriana N. Ginther v. The Ginther Trust, A Texas Joint Venture and Redstone El Dorado Acquisition, L.P.*, dismissing the appeal as moot, entered June 27, 2000, is set forth in the Appendix hereto (Pet. App. 8a).

3. The order of the United States Court of Appeals for the Fifth Circuit in No. 00-20216; *In re The Ginther Trusts, A Texas Joint Venture*, denying the motion for stay pending appeal, entered March 22, 2000, is set forth in the Appendix hereto (Pet. App. 9a).

4. The order of the United States District Court for the Southern District of Texas, Houston Division, in No. H-00-925; *Fergus M. Ginther and Adriana N. Ginther v. The Ginther Trust, A Texas Joint Venture and Redstone El Dorado Acquisition, L.P.*, denying the motion for stay pending appeal, entered March 17, 2000, is set forth in the Appendix hereto (Pet. App. 11a).

5. The Final Judgment of the United States Bankruptcy Court, Southern District of Texas, Houston Division, in No. 98-32663-H4-11, Adversary No. 99-3058; *In re the Ginther Trusts, A Texas Joint Venture*, entered March 3, 2000, is set forth in the Appendix hereto (Pet. App. 13a).

6. The order on the motion to dismiss of the United States Bankruptcy Court, Southern District of Texas, Houston Division, in No. 98-32663-H4-11; *In re the Ginther Trusts,*

A Texas Joint Venture, entered June 24, 1998, is set forth in the Appendix hereto (Pet. App. 42a).

7. The order of United States District Court for the Southern District of Texas, Houston Division, in No. H-00-1691, *Fergus M. Ginther and Adriana N. Ginther v. Charter Title Company; NuCorp, Inc.; and Don J. Davis*, entered January 4, 2001, affirming the bankruptcy court's "Order Rescinding Order" and "Order Dispersing Funds" the is set forth in the Appendix hereto (Pet. App. 46a).

8. The order of the United States District Court for the Southern District of Texas, Houston Division, in No. MC-00-110, *Fergus M. Ginther and Adriana N. Ginther v. Charter Title Company; NuCorp, Inc.; and Don J. Davis*, denying the motion for stay pending appeal, entered April 11, 2000, is set forth in the Appendix hereto (Pet. App. 54a).

9. The Order Disbursing Funds of the United States Bankruptcy Court, Southern District of Texas, Houston Division, in No. 98-32663-H4-11, Adversary No. 99-3058; *In re the Ginther Trusts, A Texas Joint Venture*, (*Fergus M. Ginther and Adriana N. Ginther v. Charter Title Company; NuCorp, Inc.; and Don J. Davis*) entered April 10, 2000, is set forth in the Appendix hereto (Pet. App. 55a).

10. The "Order Rescinding Order" of the United States Bankruptcy Court, Southern District of Texas, Houston Division, in No. 98-32663-H4-11, Adversary No. 99-3058; *In re the Ginther Trusts, A Texas Joint Venture*, (*Fergus M. Ginther and Adriana N. Ginther v. Charter Title Company; NuCorp, Inc.; and Don J. Davis*) entered April 10, 2000, is set forth in the Appendix hereto (Pet. App. 57a).

11. The order depositing interpleader funds of the United States Bankruptcy Court, Southern District of Texas, Houston Division, in No. 98-32663-H4-11, Adversary No. 99-3058;

In re the Ginther Trusts, A Texas Joint Venture, (*Fergus M. Ginther and Adriana N. Ginther v. Charter Title Company; NuCorp, Inc.; and Don J. Davis*) entered April 10, 2000, is set forth in the Appendix hereto (Pet. App. 60a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on January 29, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III:

> **Section 2.** The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United State, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

11 U.S.C. § 101:

Section 101. Definitions

In this title —

(15) "entity" includes person, estate, trust, governmental unit, and United States trustee;

11 U.S.C. § 109:

Section 109. Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

11 U.S.C. § 363(m):

Section 363. Use, sale, or lease of property

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Tex. Rev. Civ. Stat. Ann. art. 6132b-2.02:

> **Art 6132b-2.02 Partnership Defined; Application to Joint Venture and Limited Partnership; Capacity as Partner; Mergers; Medical Professions**
>
> (a) Association to Carry on Business for Profit. Except as provided by Subsections (b) and (c), an association of two or more persons to carry on a business for profit as owners creates a partnership, whether the persons intend to create a partnership and whether the association is called a "partnership," " joint venture," or other name . . .
>
> (c) Person with Capacity as Partner. A Person may be a partner unless the person lacks capacity apart from this Act.

STATEMENT OF THE CASE

Petitioner Fergus M. Ginther owns a one-quarter beneficial interest in a majority (51.45%) undivided interest in a 2000 acre tract of real property, known as the El Dorado Ranch. This interest in the El Dorado Ranch had been conveyed in trust by his parents, Mr. and Mrs. N.C. Ginther, to the trustee under an express *inter vivos* trust agreement entitled the Ginther Revocable Trust Agreement.[1] N.C. Ginther had been quite

1. For all that follows concerning the issue of subject matter jurisdiction, it is important to note that the Ginther Revocable Trust Agreement provided that, after the death of the first settlor to die, the trust estate would be split into two shares, to be held and administered separately by the trustee and to be known as the deceased grantor's trust and the surviving grantor's trust. Thus, when N.C. Ginther died in 1989, trust estates known as the N.C. Ginther Trust and the Minnie Lee Ginther Trust were born. After the death of the surviving grantor, the trust estates were to be reunited under the deceased grantor's trust (Cont'd)

successful in the oil and gas business, and he and his wife accumulated a substantial estate. As part of their estate planning scheme, Mr. and Mrs. N.C. Ginther contributed the bulk of their property to several different trust estates created under various trust agreements, including the Ginther Revocable Trust Agreement. Mr. N.C. Ginther died in September 1989, and Mrs. N.C. Ginther died in July 1999.

In 1994, a group of working interest owners in certain oil and gas leases sued the executor of the Estate of N.C. Ginther, deceased, and the trustee under one of the trusts created by the Ginthers, claiming that N.C. Ginther had negligently and fraudulently failed to file certain oil and gas production reports with the Texas Railroad Commission. The suit was filed and heard in the probate court in Harris County, Texas, in the proceeding in which N.C. Ginther's will had been admitted to probate. By the time the case went to trial, a Texas chartered trust company, Advent Trust Company, having been appointed in the same probate proceeding, occupied the offices of sole successor executor and sole successor trustee under each of the trust agreements created by Mr. and Mrs. N.C. Ginther.

The jury awarded the plaintiff group $4,281,000 in damages, and, in 1997, judgment against the executor and trustee, jointly and severally, was entered on the verdict.

(Cont'd)

estate. (Pet. App. 61a-63a). It is also worthy of note that the Ginther family acquired the El Dorado Ranch, on which a golf course was developed and operated, in the early 1950's. Original ownership was 50% by Mr. and Mrs. N.C. Ginther, and 12½%, by each of their four children, including Petitioner. By the time of trial, through mesne conveyances of the various interests over the intervening 45 years, including the conveyance in trust at issue here, there were sixteen separate owners of undivided interests in the El Dorado Ranch.

The executor and trustee appealed. Pending appeal, the probate court denied their request to post alternate security and granted the plaintiffs' application for turnover of all estate and trust assets to a receiver.

In response to this state of affairs, on March 11, 1998, a Debtor styling itself the Ginther Trusts, a Texas Joint Venture, filed a petition for relief under Chapter 11 in the bankruptcy unit of the United States District Court for the Southern District of Texas. The Debtor claimed to be a *de facto* joint venture composed of Advent Trust Company, as trustee under six different trust agreements established by Mr. and Mrs. N.C. Ginther. The probate court judgment creditors moved to dismiss. On June 24, 1998, the bankruptcy court entered its order on the motion to dismiss, specifically ruling as follows:

> ORDERED, that this case shall be dismissed without further order of the Court unless Debtor, on or before June 26, 1998; (a) amends the Petition, Schedules and Statement of Financial Affairs to provide that it is a joint venture composed solely of the Noble C. Ginther Trust a/k/a/ N.C. Ginther Grantor Trust and the Minnie Lee Ginther Grantor Trust a/k/a M.L. Ginther Trust; and (b) amends its Schedules and Statement of Financial Affairs to provide that the only property of the joint venture comprising Debtor's bankruptcy estate is its interests in or relating to the Eldorado Golf Club, Inc. and the real estate known as the "El Dorado Ranch" described in Debtor's existing Schedules as "undivided interest in approximately 2,033 acres of real property located in Harris County, Texas". It is further,
>
> ORDERED, that no other property, whether listed in the Debtor's existing Schedules or

> otherwise, is property of the Debtor's bankruptcy estate or subject to the automatic stay pursuant to 11 U.S.C. § 362.

(Pet. App. 42a-43a). No party sought leave to appeal, and the Debtor filed the required amendments.

The bankruptcy case continued. The judgment creditors and several other working interest owners, whose claims against N.C. Ginther were pending in separate causes before the probate court, filed claims as unsecured creditors. In April 1999, the Debtor applied for authority to sell a large parcel, more that 1600 acres, of the El Dorado Ranch pursuant to 11 U.S.C. § 363. The application was brought as an adversary proceeding naming co-owners as defendants. Petitioner and his wife were named as defendants in the Third Amended Complaint filed in the adversary proceeding on October 14, 1999.[2]

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2. A digression here. In 1992, Petitioner, himself mired in a an involuntary Chapter 7 bankruptcy proceeding that lasted from 1982 until 1997, entrusted management of his residual assets, including any residual interest in his remaining 9.375% individual interest in the El Dorado Ranch, to his ex-business partner Davis. To hold title to the assets, they created a corporation, NuCorp, Inc., which Davis controlled. A compensation agreement controlled how recovered assets were to be distributed. In 1996, the court in Petitioner's Chapter 7 proceeding recognized the assignment and awarded the residual of Petitioner's Chapter 7 estate to NuCorp, Inc.

Davis negotiated and brokered the sale of the Ranch to Redstone and was awarded a commission in the Final Judgment. (Pet. App. 19a). After the initial contracts with Redstone were executed, Davis claimed that the commission to be paid would be all his and that the remaining proceeds from the sale of the 9.375% had been eaten up in fees and expenses charged to the corporation (mainly, as it turned out, a $10,000.00 a month management fee secretly being accrued by Davis since 1992). Accordingly, in July 1999, Petitioner filed suit for breach

(Cont'd)

Meanwhile, the probate court judgment on the $4,281,000 jury verdict was reversed and rendered by a Texas appellate court on November 30, 1999. *See Advent Trust Co. v. Hyder*, 12 S.W.3d 534 (Tex. App.-San Antonio 1999, writ denied).[3] After reversal of the judgment, the bankruptcy court was urged, but declined again, to dismiss the case, and the Debtor, deeming it expedient and in accordance with the purchaser's wishes, particularly considering the number of co-owners, proceeded to prosecute the adversary proceeding seeking authority to sell the El Dorado Ranch pursuant to 11 U.S.C. § 363.

The case was tried to the bankruptcy court on January 27 and 28, 2000. During the trial, it was conceded that the Debtor, The Ginther Trusts, a Texas Joint Venture, owned no interest of record in the El Dorado Ranch. Final Judgment authorizing the sale of the Ranch was entered March 2, 2000. (Pet. App. 13a). On March 13, 2000, Petitioner timely filed post-trial motions pursuant to Rule 52, Fed. R. Civ. P. These were denied the same day, and Petitioner filed his notice of

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(Cont'd)

of fiduciary duty in a Texas state district court in Harris County, Texas, and filed a *lis pendens* as to the 9.375% interest owned of record by NuCorp, Inc. The Debtor joined Petitioner as a defendant because of the *lis pendens* filed as to the 9.375% interest. After the sale closed, Petitioner sought to prevent Davis from receiving outright the proceeds attributable to the commission and the 9.375% interest. The course of the dispute over these proceeds in subsequent proceedings before the bankruptcy court and in the reviewing courts is detailed below.

3. The Texas appellate court had also ultimately acted (but only well after the bankruptcy petition was filed) to preserve the status quo pending appeal, thus granting effective relief from the turnover order. *See* 12 S.W.3d at 544 n.5. In hindsight, the trustee should have had faith in the Texas judicial system rather than in a convoluted theory of federal bankruptcy jurisdiction designed to wrench the case from state court.

appeal on March 15, 2000. An emergency motion to stay enforcement of the judgment was lodged in the bankruptcy court, in the district court, and in the Fifth Circuit. This motion was denied by the bankruptcy court on March 13, 2000, by the district court on March 17, 2000, (Pet. App. 11a), and by the Fifth Circuit on March 22, 2000. (Pet. App. 9a).

The sale of the 1600 acre parcel of the El Dorado Ranch to Redstone El Dorado Acquisition, LP for $10,000,000 in cash closed on March 23, 2000. The Debtor received $4,787,313.21 as net proceeds for the 51.45% owned of record by the trustee under the Ginther Revocable Trust Agreement. The trustee, who did not appear in the adversary proceeding, ratified the transaction and executed the deed, but received nothing for the conveyance of the property entrusted to it.

By order dated June 27, 2000, the district court dismissed Petitioner's appeal as moot. On January 29, 2001, the Fifth Circuit affirmed the district court's dismissal of the appeal as moot.

Immediately after the closing of the sale, Petitioner followed the dictates of the Final Judgment (Pet. App. 32a) and filed in the bankruptcy case his objection to distribution of the proceeds to certain parties, including the Debtor. Petitioner also obtained a temporary restraining order in his pending state court action against his ex-partner Davis restraining the title company from distributing the net proceeds attributable to the sale of the 9.375% interest and the amount payable as commission (together amounting to approximately $1,100,000.00) to Petitioner's ex-partner Davis or the corporation formed to hold Petitioner's assets. In advance of an injunction hearing, the title company agreed to pay these disputed funds into the registry of a court.

On March 27, 2000, the title company filed an interpleader action in the bankruptcy court, under the same cause number as the recently concluded and appealed adversary proceeding, and tendered the disputed funds into the registry of the United States District Court for the Southern District of Texas. Over objection,[4] the bankruptcy court exercised jurisdiction over the interpleader action and entered an order authorizing deposit of the disputed funds into the registry of the federal district court. Later that same day, without further notice or hearing, the bankruptcy court entered two orders rescinding its previous order and granting immediate disbursement of the funds which were the subject of the interpleader action to the ex-partner Davis and the corporation controlled by him. Petitioner appealed the last two orders as final orders disposing of the interpleader action and again sought a stay, which again was denied by the district court. After the stay was denied, the appeal was transferred to the district judge assigned to hear the appeal of the March 3, 2000 Final Judgment, and who had already heard and denied the motion to stay enforcement of that judgment. On February 28, 2001, the district court affirmed, holding that Petitioner's proper course to seek redress was through appeal of the March 3, 2000 Final Judgment, *an appeal the district court had previously dismissed as moot.* (Pet. App. 52a-53a). In so holding, the district court again did not address the threshold issue of subject matter jurisdiction of the bankruptcy court. That order has now been appealed to the Fifth Circuit.

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4. The bankruptcy unit of the district court lacked subject matter jurisdiction over this interpleader action for the additional reason that it had no effect on the debtor, its estate or the administration thereof. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 309-11 (1995). However, because Petitioner is a citizen of Missouri and Davis a citizen of Texas, the district court did have original jurisdiction of the interpleader action. 28 U.S.C. § 1335.

On January 18, 2001, the bankruptcy court entered an order on its own motion determining "that a plan must be confirmed within 120 days or this case shall be converted to Chapter 7." Petitioner continues before the bankruptcy court, seeking recovery of his equitable estate pursuant to 11 U.S.C. § 541(d), that reclamation action now and pending as an adversary proceeding, No. 00-3748, in the bankruptcy court. A liquidating plan of reorganization was confirmed over Petitioner's objections at a hearing held on April 26, 2001.

REASONS FOR GRANTING THE WRIT

Yet again, "[t]his case concerns the authority of the federal courts to adjudicate controversies." *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). This case unquestionably presents a "manufactured, convoluted federal subject matter theor[y] designed to wrench [the] case from state court." *Ruhrgas*, 526 U.S. at 587. And the issue of subject matter jurisdiction here presented squarely comports with this Court's observation "that in most instances subject matter jurisdiction will involve no arduous inquiry." *Id.* Yet this threshold issue has evaded review at each of six opportunities, despite this Court's admonition "that subject-matter delineations must be policed by the courts on their own initiative even at the highest level." *Id.* at 583.

The failure of the reviewing courts to address the issue of subject matter jurisdiction when that issue was the sole threshold issue is excused and obscured by the subsequently arising threshold issue of mootness, which arises only because the same reviewing courts failed to address subject matter jurisdiction in ruling on a motion to stay enforcement of the judgment. Something is wrong with our judicial system when review of a challenge to subject matter jurisdiction can be avoided repeatedly.

In *Ruhrgas*, the backdrop for the issue before the Court was *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). *Id.* 526 U.S. at 577. In the present case, *Ruhrgas* and *Steel Co.* together provide the backdrop for the issue presented. Does the right of a federal appellate court, articulated in *Ruhrgas*, to pick and choose threshold issues on which to deny an audience on the merits, unwittingly provide a rationale for evading the subject matter jurisdiction issue altogether, at every stage of the proceeding, even at those stages of the proceeding in which subject matter jurisdiction is the only threshold issue?

I. AN ABSOLUTE MOOTNESS DOCTRINE IN APPEALS GOVERNED BY 11 U.S.C. § 363(m) PERVERTS THE RULE IN *RUHRGAS* AND ALLOWS THE ISSUE OF SUBJECT MATTER JURISDICTION TO BE EVADED

Unquestionably, a federal court has the power to dismiss for mootness without reaching the issue of subject matter jurisdiction. *Ruhrgas*, 526 U.S. 574, 584-85. There is no absolutely dictated sequencing of jurisdictional issues. "It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585.

But in *Ruhrgas*, this Court, following *Steel Co.*, also reiterated that:

> Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case . . . Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations

> must be policed by the courts on their own initiative even at the highest level.

Ruhrgas, 526 U.S. at 583 (citing *Steel Co.*, 523 U.S. at 94-95, 101-102 (1998)).

The writ should be granted because the course of this proceeding calls for the exercise of this Court's supervisory powers: *it calls for the policing of subject matter jurisdiction at the highest level because obviously it will be policed in this case in no other way.*

There have been six opportunities for reviewing courts to pass on the "non-arduous" jurisdictional issue presented in this case. That issue is simply whether a family trust instrument, created by a husband and wife for the benefit of their children, which separates the trust *res* into two trust estates for a period of time after the death of the first of them to die, allows a bankruptcy court to avoid well recognized limitations on the Congressional grant of subject matter jurisdiction to federal bankruptcy courts and to view the trust scheme as a *de facto* joint venture business entity eligible to seek relief in bankruptcy. The issue is determined solely from construction of a trust instrument and the application of well-settled law thereto. Yet, this simple and fundamental issue has repeatedly evaded review in what is becoming almost Kafkaesque fashion.

The stage is now set for another round of orders confirming a plan of liquidation, more appeals, more applications for stays and denials thereof, and more consequent dismissals of appeals as moot. Through it all, unless this Court intervenes, the challenge to subject matter jurisdiction may never be heard. Meanwhile, the assets of a trust are being withered by administrative claims of the Debtor, the unsecured creditors committee, and the liquidation plan proponent, and by claims of "unsecured creditors", whose only claims are stale claims against the late N.C. Ginther personally.

The mechanism by which this feat has been accomplished is the "absolute mootness" doctrine developed in the Ninth Circuit, and now applied in exemplary fashion by the Fifth Circuit in this case. The "absolute mootness" rule was first articulated by the Ninth Circuit in *In re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 (9th Cir. 1988) and reiterated and extended by that court in *In re Filtercorp, Inc.* 163 F.3d 570, 576 (9th Cir. 1998). The Ninth Circuit's articulation of the rule is that:

> Finality in bankruptcy has become the dominant rationale for our decisions; the trend is towards an absolute rule that requires appellants to obtain a stay before appealing a sale of assets.

The Ninth Circuit makes no secret that its "absolute mootness" rule exalts the particular need for finality in bankruptcy cases[5] over the general Article III mootness analysis, first articulated by this Court in *Mills v. Green*, 159 U.S. 651, 653 (1895) and reiterated in *Church of Scientology of California*

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5. Perhaps the most succinct statement of the policy for respecting finality in bankruptcy cases, and the role of a stay in furthering that policy, is provided by Judge Easterbrook:

> [t]he significance of an application for a stay lies in the opportunity it affords to hold things in stasis, to prevent reliance . . . while the appeal proceeds. A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization. And it is the reliance interest engendered by the plan, coupled with the difficulty of reversing critical transactions, that counsels against attempts to unwind things on appeal. Every incremental of revision on appeal puts a cloud over the plan of reorganization and derivatively over the assets of the reorganized firm.

In re UNR Industries, 20 F.3d 766, 769-70 (7th Cir. 1994).

v. United States, 506 U.S. 9, 12 (1992), which requires a court considering the question of whether an appeal is moot to determine whether it is impossible to grant the prevailing party any effectual relief whatsoever. Indeed, in *Filtercorp, Inc.* the Ninth Circuit expressly held that under its espoused "absolute mootness" rule for appeals governed by 11 U.S.C. § 363(m), the issue of whether the appellate court can fashion effective relief is immaterial. 163 F.3d at 517.

The Circuits are divided on this important issue. The Tenth Circuit, in a very well reasoned opinion citing *Mills v. Green* and *Church of Scientology*, has held that "where state law or the Bankruptcy Code provides remedies that do not affect the validity of the sale, § 363(m) does not moot the appeal". *In re Osborn*, 24 F.3d 1199, 1204 (10th Cir. 1997); *see also In re BCD Corp.*, 119 F.3d 852 (10th Cir. 1997). The Seventh Circuit in *In re Lloyd*, 37 F.3d 271, 273 (7th Cir. 1994) likewise held that inability to recover the land sold does not render the entire appeal moot where — as here — the appellant claims an interest in the proceeds.

In this case, Petitioner's claim as *cestui que* trust has been asserted continuously and is currently pending before the bankruptcy court. Petitioner wants return of his trust property either to himself through reclamation or to a proper trustee through dismissal of the case for lack of subject matter jurisdiction. Petitioner could have been given effectual relief at any stage of the proceeding by dismissal of the case for want of subject matter jurisdiction.[6]

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6. Petitioner is 64 years old, is unemployed and lives in straitened circumstances outside of Branson, Missouri. He has had recent health problems, but has no insurance. His requests for help in defraying medical expenses to his trustee have gone unanswered while hundreds of thousands of dollars in interim administrative fees have been paid (Cont'd)

The present case presents a salient example of the "absolute mootness" rule, allegedly codified in 11 U.S.C. § 363(m), being given its intended mechanical application: if a stay is not *obtained*, the case becomes automatically moot. The question of whether any effectual relief may be had is rendered immaterial; not even addressed by the reviewing court. The statutory language of 11 U.S.C. § 363(m) itself is all to the contrary of an absolute mootness rule. The statute is clear that reversal or modification on appeal of orders authorizing sales may be had even though the validity of the sale to a good faith purchaser may not be affected by such reversal or modification. The statute expressly contemplates the very appeals which the absolute mootness rule forecloses. This Court should grant the writ because the clear wording and import of 11 U.S.C. § 363(m) is being stood on its head in the developing case law.

II. *STEEL CO.* REQUIRES THAT SUBJECT MATTER JURISDICTION BE DETERMINED BEFORE THE MERITS OF THE REQUEST FOR STAY MAY BE REACHED

Petitioner's challenge to subject matter jurisdiction was certainly not moot when the district court and the Fifth Circuit ruled on his motion to stay enforcement of the judgment pending appeal. Yet neither court considered whether this entire proceeding had carried the court "beyond the bounds of authorized judicial action." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998).

(Cont'd)
from the proceeds available from the sale of the El Dorado Ranch. Dismissal would return the property to the trust, for which achievement Petitioner would be entitled to reimbursement. *See Hobbs v. McLean*, 117 U.S. 567, 582 (1886). Relief from the expenses and claims attendant to a bankruptcy proceeding itself would be, and will be, effectual relief.

A reviewing court's denial of a motion to stay without addressing the issue of subject matter jurisdiction is tantamount to an exercise of hypothetical jurisdiction. *See id.*, 523 U.S. at 101. In this case hypothetical jurisdiction appears to have produced more than a hypothetical result: the bankruptcy court's order becomes immune from any challenge.

The federal courts may not hypothesize jurisdiction to rule on the merits of a motion to stay any more than they may do so to rule on the merits of any other issue. "Without jurisdiction, the court cannot proceed at all in any cause." *Id.*, 523 U.S. at 94. Here the Congressionally proscribed limits of bankruptcy jurisdiction have been directly challenged at every stage, and yet the question of whether this entire proceeding is out of bounds has never been addressed.

It is apparent from the course of this appeal that the application for stay is the crucial step in appealing orders authorizing sales of assets under 11 U.S.C. § 363. The reviewing court's inquiry into the familiar four issues to be considered on the merits of a motion to stay in itself presupposes and depends on the existence of subject matter jurisdiction in the court from which the judgment issued. The power and duty of a court to protect its jurisdiction involves the power and duty to police its limited jurisdiction from unauthorized, expedient and consensual uses. In requesting a stay from the Fifth Circuit, on March 21, 2000, Petitioner put the issue directly to the Court:

> In sum, in the interest of justice, in the interest of all concerned, this Court should stay enforcement of the Final Judgment in this case only so long as is necessary to rule on the subject matter jurisdiction issue. It is this Court's responsibility to consider the question of subject matter jurisdiction and to dismiss the action if such jurisdiction is lacking. This Court has a responsibility to act on that issue and has the

power to do so within the context of this appeal. *See Magnolia Marine Transport v. LaPlace Towing Corp.*, 964 F. 2d 1571, 1580 (5th Cir. 1992).

Moreover:

> It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. Bank of North-America*, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936).

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

These impatient parties will surely cooperate in a most truncated schedule to be fashioned by the Court which will allow them the opportunity to bring forward anything from the record to discharge their burden of proving that subject matter jurisdiction exists. Appellants are ready to submit the case on the basis of (1) the trust agreement itself, (2) the undisputed fact that there is only one trustee and thus there cannot be a joint venture, and (3) the undisputed and conclusively proved fact that the alleged joint venture owns no title to the Eldorado Ranch. Why cannot this case be submitted either now or within a matter of several more days by all interested parties? Then we will have it up or down to the final relief of all the parties.

In sum, in a society governed by the rule of law, the limits of the powers of courts and of parties acting in those courts need to be clearly defined and

> scrupulously observed. This Court clearly has the power and duty to act on the issue and the power to preserve the *status quo* to protect its power to so act.

Despite this plea, the Fifth Circuit denied the motion for stay without comment on March 22, 2000. (Pet. App. 9a). The sale of the El Dorado Ranch to Redstone El Dorado Acquisition LP closed the following day. From that point on, the absolute mootness rule has operated to foreclose any review of the fundamental issue of subject matter jurisdiction.

III. ABSOLUTE MOOTNESS AS APPLIED IN THIS CASE CANNOT BE SQUARED WITH VACATUR

The Court should also consider that, as applied in this case, an absolute mootness rule hopelessly conflicts with the remedy of vacatur. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 22-25 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). In this case, absolute mootness pretermitted even the issue of good faith. The disute over a 12.86% undivided interest is subject to the equitable remedy of vacatur as announced by this Court by reason of an overagressive mootness analysis. For the subject matter jurisdiction issue to be rendered "irrelevant", merits issues must be avoided at all cost.

The policy of finality which spawned the absolute mootness rule is trumped by the rule that prevents "a judgment, unreviewable for mootness, from spawning any legal consequences". *Munsingwear*, 340 U.S. at 41. The good faith purchaser, whose interest is to be protected by the policy of finality, is frustrated if the finding of good faith is subject to vacatur. The Fifth Circuit *per curiam* opinion's discussion of good faith, a sort of a sticking the foot in to test the waters in

the pool of merits issues, at best muddies the issue.[7] As the case now stands, if the Court denies this Petition, Petitioner will move to vacate the finding of good faith and the other findings in the judgment in the bankruptcy court. This motion will be denied. The bankruptcy court has already announced its conclusion that all issues are *res judicata* by virtue of the Fifth Circuit's "affirmation" of the judgment. This case could be back, the jurisdictional issue still unresolved. "Denial of a motion to vacate could bring the case here. Our supervisory power over the judgments of the lower federal courts is a broad one." *Munsingwear*, 340 U.S. at 40.

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7. The Fifth Circuit observed that "Appellants challenged the Venture's record title to the Ranch. . . .". (Pet. App. 4a). Actually, the seller's lack of title was conceded at trial. This, of course, was the dispositive fact on the issue of good faith. Protecting good faith purchasers by providing notice is the very reason we have developed throughout the land the systematic apparatus for the recordation of deeds of real property. *See Brush v. Ware*, 40 U.S. 93, 110-114 (1841); *see also Anthony v. Butler*, 38 U.S. 423, 434 (1839) (object of recording act is to give notice to subsequent purchasers.) It is impossible under this system for a purchaser of real estate to be in good faith when he knows his seller does not own the property. Redstone had notice of Petitioner's claim and therefore was not in the predicament of a good faith purchaser for value *without notice. See Brush v. Ware, id.*; *see also Oliver v. Piatt*, 44 U.S. 333, 401 (1839). The Fifth Circuit's treatment of the bankruptcy court's express finding of good faith as an "argument" or "claim" which Petitioner allegedly failed to raise in the bankruptcy court could be argued to be a ruling on the merits. However, in the final analysis, perhaps even mindful of the need to avoid all merits issues in order to render jurisdiction "irrelevant," the Court of Appeals simply declared: "we need not address the issue", and then indicated *what it would likely do* if it were to reach the good faith issue. (Pet. App. 5a).

IV. THERE ARE TWO OBVIOUS SOLUTIONS TO THE PROBLEM

Procedurally, this case presents the compelling situation where a stay of the bankruptcy court's orders was timely sought in the bankruptcy court, the district court and the Fifth Circuit. In each instance, Petitioner challenged subject matter jurisdiction, and in each instance the application for stay was denied without the court expressly ruling on the issue of subject matter jurisdiction. Thereafter, the appeal itself was dismissed as moot by the district court and the Fifth Circuit, each court again declining to reach the issue of subject matter jurisdiction, the Fifth Circuit ultimately finding the issue "irrelevant."[8] Another round of orders which finally disposed of the interpleader action were then appealed. A stay again was denied without comment, and the orders affirmed by the district court on the basis that Petitioner should have sought redress in the appeal already dismissed as moot. And, as stated above, the

8. It is particularly bitter to consider the Fifth Circuit's reliance on *In re Sax*, 796 F.2d 994 (7th Cir. 1986) in holding that mootness rendered the challenge to subject matter jurisdiction irrelevant. In *Sax*, the appellant failed to seek or obtain a stay. The Seventh Circuit held:

> Despite the maxim that "subject matter jurisdiction can be raised at any time," *valid procedural rules cannot be ignored* just because the jurisdictional decision is being challenged rather than the decision on the merits. *To accept Three Rivers' argument would be to ignore valid procedural requirements.*

796 F.2d at 998. (Emphasis added).

Unlike the appellant in *Sax*, Petitioner in this case diligently pursued review of the subject matter jurisdictional issue *in advance* of the sale. Diligent attention to procedural rules prevented the maturation of reliance interests and obviated the need to respect finality at the stage where Petitioner sought to stay enforcement of the judgment both in the district court and in the Court of Appeals.

stage is set for another round in connection with the anticipated order from the bankruptcy court announced in court last Thursday, April 26, 2001, confirming a plan of liquidation. Yet through it all, *the issue of subject matter jurisdiction has never been addressed.*

There are two ways out of this dilemma. In dismissing this appeal as moot, the Court of Appeals never addressed Petitioner's argument that dismissal of the case for want of subject matter jurisdiction would grant effectual relief to Petitioner because he claimed an interest in the proceeds. Rather, the Court of Appeals simply held that because Petitioner failed to obtain a stay of the order authorizing the Ranch sale and because the sale occurred pending the appeal of the order to the district court, the district court properly dismissed the appeal as moot. Petitioner submits that traditional mootness analysis still applies to appeals of such orders and that this Court should act to foreclose advance of an "absolute mootness" rule, which appears to be gaining momentum in the overburdened courts, as reflected in this decision from the Fifth Circuit and in previous decisions from the Ninth Circuit.

Alternatively, following *Steel Co.*, this Court should hold that in bankruptcy cases, in which the motion to stay has assumed such central importance, the issue of subject matter jurisdiction must be addressed prior to ruling on the merits of the motion to stay. Whatever the range of powers which may be exercised by a court without first passing on subject matter jurisdiction, denial of a motion to stay enforcement of a judgment authorizing the sale of assets in bankruptcy should not be included.

V. THIS COURT IS CALLED UPON TO POLICE THE CRIME OF A "DRIVE-BY" JURISDICTIONAL RULING

The Fifth Circuit, after holding that the issue of subject matter jurisdiction was "irrelevant," let it be known that:

> Moreover, we are persuaded, as was the bankruptcy court, that the Venture's resulting co-ownerships following the division of the original trust on the death of the first settlor to die is [sic] a de facto joint venture under Tex. Civ. Code [sic] Ann. § [sic] 6132b.

(Pet. App. 6a-7a).

This is a lovely example of a "drive-by jurisdictional ruling"[9] in a *per curiam* disposition, which this Court has indicated it will view "with its customary skepticism."[10] In fact, the statement is obviously nonsensical, at best a tautology. The resulting ownership by the venture is a venture. Already this meaningless dicta has prejudiced Petitioner in the continuing proceedings in the bankruptcy court. Its almost as if this statement was thrown out gratuitously *with the knowledge that the case was not moot.*

Throughout the entire course of this proceeding, all the parties and, one assumes, all the reviewing courts have accepted the principle that Congress has withheld federal bankruptcy court jurisdiction over estates and trusts. This has always been the case with the purely statutory bankruptcy

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9. *See Steel Co.*, 523 U.S. at 101.

10. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994).

jurisdiction. *See, e.g., Adams v. Terrell*, 4 Fed. 796, 801-02 (C.C.W.D. Tex. 1880). This understanding motivated the concoction of the joint venture theory.

In decisions under the current Bankruptcy Code, many courts have pointed to the specific legislative history[11] of 11 U.S.C. § 109 and concluded that "this legislative history, if not the express words of the statute, indicate that 'the definition [of "person"] does not include an estate or trust.' " *In re Sanders*, 91 B.R. 317, 321 (Bankr. E.D. Penn. 1988); *see also, e.g., In re Goerg*, 844 F.2d 1562, 1566 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989); *Matter of 299 Jack-Hemp Associates*, 20 B.R. 412, 413 (Bankr. S.D.N.Y. 1982); *In re Cahill*, 15 B.R. 639, 640 (Bankr. E.D. Penn. 1981); *In re Old Second National Bank of Aurora*, 7 B.R. 37 (Bankr. N.D. Ill. 1980); *In re Cohen*, 4 B.R. 201, 201-05 (Bankr. S.D. Fla. 1980). Some of these courts also focused on the definition of entity in 11 U.S.C. § 101(15) as reinforcement for the conclusion that estates and trusts are not "persons" entitled to seek relief.[12]

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11. H. Rep. No. 595 95th Cong. 1st Sess. 313 (1997); and S. Rep. No. 989, 95th Cong., 2nd Sess. 25 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5811, 6270.

12. Other courts, on various grounds, have distinguished family, testamentary, personal and spendthrift trusts from business trusts, or so called "Massachusetts Trusts", over which Congress has expressly bestowed federal bankruptcy jurisdiction, e.g. *See e.g., Cantor v. Wilbraham and Monson Academy*, 609 F.2d 32, 33 (1st Cir. 1979); *Associated Cemetery Management, Inc. v. Barnes*, 268 F.2d 97, 101-102 (8th Cir. 1959); *Pope & Cottle Co. v. Fairbanks Realty Trust*, 124 F.2d 132, 135 (1st Cir. 1941); *In re Action Roofing & Supply Co.*, 137 B.R. 217, 219 (Bankr. S.D. Tex. 1991); *In re Margaret E. DeHoff Trust*, 114 B.R. 189, 191 (Bankr. W.D. Mo. 1990); *In re Johnson*, 82 B.R. (Cont'd)

Let's finally face it — here at the highest level — the emperor has no clothes! As noted at the outset, the trust instrument at issue provided that the corpus of the trust was to be split into two shares after the first of the couple died, to be separately held and administrated by the trustee until the death of the survivor, when the two shares were to be reunited. (Pet. App. 61a-63a). This feature of the trust instrument cannot and does not convert this express trust relationship into a *de facto* partnership or joint venture business entity under Texas or any other law.

This instrument cannot be read to reveal an *intent* to create a trust relationship over property for only so long as the husband and wife were living which then converts to a partnership business entity to be managed by the trustee during the survivor's remaining life, then only to convert once again into a trust relationship after the survivor's death. In reality, the share splitting feature of the trust instrument is simply a very common feature of marital living trusts drafted in community property states such as Texas. It is also consistent with the general tax motivated features of the trust instrument.

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618,619 (Bankr. S.D. Fla. 1988); *In re Walker*, 79 B.R. 59, 61-62 (Bankr. M.D. Fla. 1987); *In re L&V Realty Trust*, 61 B.R. 423, 424-25 (Bankr. D. Mass. 1986); *In re Armstead and Margaret Wayson Trust*, 29 B.R. 58, 59 (Bankr. D. Md. 1982).

Several courts have also focused on the fundamental legal proposition that an ordinary trust is not a legal entity and has no legal existence separate and apart from the trustee. *E.g.*, *In re Associated Cemetery Management, Inc., Employers Profit Sharing Trust*, 170 F. Supp. 298, 302 (W.D. Missouri 1958), *aff'd sub nom. Associated Cemetery Management, Inc. v. Barnes*, 268 F.2d 97 (8th Cir. 1959); *In re Armstead and Margaret Wayson Trust*, 29 B.R. 58, 59 (Bankr. D. Md. 1982).

Even so, under Texas law, a partnership is an association of two or more persons to carry on a business for profit. Each of these persons must have legal capacity. Tex. Rev. Civ. Stat. Ann. art. 6132b – 2.02(a) and (c). Shares of a trust estate, even though given names, are not legal entities, and are not persons with capacity to enter into partnerships in the eyes of the law. *See In re Associated Cemetery Management, Inc., Employers Profit Sharing Trust*, 170 F. Supp. 298, 302 (W.D. Missouri 1958), *aff'd sub nom., Associated Cemetery Management, Inc. v. Barnes*, 268 F.2d 97 (8th Cir. 1959). ("Although the trust instrument here creates a resulting 'entity' under which the Trustees are to maintain the trust . . . it is transparent from all other provisions thereof that such entity . . . has no legal existence separate and apart from the trustee".) The separation of the shares were mere bookkeeping entries. As managing agent of the joint venture, from which two principals does the sole trustee take direction? The only person to be found here is the trustee, and, at all times material, there has been only one trustee. Clearly, this *de facto* joint venture theory is nothing but a manufactured, convoluted federal subject matter theory designed to create the mere appearance of jurisdiction where none in fact exists in order to wrench the case from state court at a strategic and desperate moment and then later to use the procedures and perceived protections of the bankruptcy court to sell the property.

One case bears particular attention because of its similarities with the instant case. *Matter of 299 Jack-Hemp Associates*, 20 B.R. 412 (Bankr. S.D.N.Y. 1982). In that case, co-executors of a decedent's estate, faced with a foreclosure action by the mortgagee on real property, formed a partnership on the eve of filing. The bankruptcy court gave this scheme short shrift:

> This court therefore holds that where its process has been utilized by a specially created entity which only the day before was barred from access to this court

> and where nothing can be achieved by recourse to that process, the attempt to do so can only be characterized as disingenuous in the last degree. More need not be shown to afford this court the cause to dismiss with prejudice.

20 B.R. at 413.

In the case at bar, there aren't even co-fiduciaries present to form the venture. As said at the outset, this subject matter jurisdiction issue involves no "arduous inquiry".

CONCLUSION

El Dorado is gone; Poe's gallant knight will ever ride in vain. But the proceeds remain, the purchaser's good faith is unresolved, and the case continues. This appeal is not moot, and this case must be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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